

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, :
 :
 Plaintiff, :
 : Civil Action No. 03-2412
 v. :
 :
 ABINGTON MEMORIAL HOSPITAL, :
 :
 Defendant. :

SETTLEMENT AGREEMENT

I. PARTIES

This Settlement Agreement (Agreement) is entered into among the United States of America, acting through the United States Department of Justice (DOJ) and on behalf of the Office of Inspector General (OIG-HHS) of the Department of Health and Human Services (HHS) (collectively the "United States"); and Abington Memorial Hospital ("AMH") (hereafter referred to as "the Parties"), through their authorized representatives.

II. PREAMBLE

As a preamble to this Agreement, the Parties agree to the following:

A. The Defendant, AMH, is a hospital located in Montgomery County, Pennsylvania, within the Eastern District of Pennsylvania. It is located in suburban Philadelphia, and it offers a full range of services. Among the services performed by AMH between 1991 and 1999 were outpatient and non-patient laboratory services (collectively "Outpatient Laboratory Services").

B. On or about April 21, 2003 the United States filed a complaint and, on or about April 25, 2003, a First Amended Complaint, in which it contended that AMH had submitted or caused to be submitted claims for payment to the Medicare Program (Medicare), Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395ggg, in connection with Outpatient Laboratory Services between 1991 and 1999.

C. In the Complaint and First Amended Complaint the United States further contended that AMH's submission of certain Medicare claims for Outpatient Laboratory Services during the period from January 1, 1991 to December 31, 1999 rendered AMH liable: (i) under the civil False Claims Act; and/or (ii) the common law theories of unjust enrichment or payment by mistake. This conduct, relating to Medicare claims between 1991 and 1999 as described in the Complaint and/or First Amended Complaint, will be referred to collectively as the "Covered Conduct."

D. The United States contends also that it has certain administrative claims against AMH for engaging in the Covered Conduct, as specified in Paragraph 4 below.

E. This Agreement is neither an admission of liability by AMH nor a concession by the United States that each, or any, of its claims could not be proved beyond the applicable standard of proof.

F. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims and counterclaims, the Parties reach a full and final settlement of all claims and counterclaims pursuant to the Terms and Conditions below.

III. TERMS AND CONDITIONS

1. AMH agrees to pay to the United States \$4.2 million (the "Settlement Amount"). AMH agrees to pay the Settlement Amount by electronic funds transfer pursuant to written instructions to be provided by the Office of the United States Attorney for the Eastern District of Pennsylvania. AMH agrees to make this electronic funds transfer no later than 30 days after the effective date of this Agreement.

2. AMH will undertake the following additional non-monetary obligations (hereinafter collectively "Non-monetary Settlement Obligations"):

a. Restructured Compliance Function

i. AMH will implement a restructured compliance function that will generally comply with the principles set forth in the HHS OIG Compliance Guidance for Hospitals. AMH will submit its restructured compliance

plan to DOJ, c/o the United States Attorney's Office for the Eastern District of Pennsylvania, for review and approval

- ii. AMH will hire from outside AMH a new Compliance Group consisting of the following full time positions: Compliance Officer; Compliance Auditor; Staff Assistant. This staff will be separate from the existing internal audit staff, which two staffs shall operate independently of one another.
- iii. The new Compliance Group will develop and implement an audit program designed to ensure the integrity of the compliance function. The audit program, conducted at least annually (or more often if deemed appropriate by the Compliance Officer or Board), will include audits of at least:
 - a. Hospital Billing;
 - b. Physician Billing;
 - c. Hospital Coding;
 - d. Physician Coding;
 - e. Hospital and Physician Charge Master;
 - f. Hospital and Physician Billing System Integrity;
 - g. Patient Refunds Process.
- iv. The Audit Committee of AMH's Board of Trustees will continue to be responsible for hospital compliance and its name will be changed to the Audit and Compliance Committee.
- b. After each compliance audit, the Compliance Officer, CEO and CFO will individually certify that: (i) they reviewed all audit results; (ii) they had access to, and reviewed as needed, all audit work papers; (iii) the audit is complete, thorough and accurate; (iv) all overpayments received by AMH have been repaid to the appropriate payers (all types including self-pay) or, with respect to private insurers only: (1) have been reported to such insurers; (2) are actively being negotiated with such insurers; and (3) have not been in

negotiations for more than six months; and (v) all leads to uncovering overpayments have been followed and investigated.

- c. AMH will implement an education program dealing with corporate integrity and compliance, billing, coding and collections. Minimum hours will be established for all full time AMH personnel with additional mandatory training for registration, coding and billing personnel.
- d. AMH will hire an Independent Review Organization to conduct review procedures in accordance with paragraph III. D. of the Corporate Integrity Agreement (CIA) referred to in paragraph 6 *infra*. This paragraph may be specifically enforced by the United States notwithstanding paragraph 19 below.
- e. AMH will expand its present pre-bill editing capabilities. AMH shall be responsible to report to DOJ any edits disabled by AMH or by any of its contractors at AMH's request.
- f. AMH will implement a Corporate Refund Policy effective June 1, 2005. This policy will ensure: (1) that all overpayments will be resolved with payers (all types including self-pay) within 90 days of receipt and acknowledgment of the overpayment; (2) that AMH will refund all overpayments identified as a result of internal or external audits or other sources of information; and (3) that AMH will follow and resolve all leads to potential overpayments. The Corporate Refund Policy shall also meet the overpayment refund requirements set forth in section III.H of the CIA. Notwithstanding the above, notification and repayment of any overpayment amount that routinely is reconciled or adjusted pursuant to policies and procedures established by the payor should be handled in accordance with such policies and procedures.

3. Subject to the exceptions in Paragraph 5 below, in consideration of the obligations of AMH set forth in this Agreement, conditioned upon AMH's full payment of the Settlement Amount and satisfaction of its Non-monetary Settlement Obligations as set forth in

paragraphs 2 and 4, and subject to Paragraph 14 below (concerning bankruptcy proceedings commenced within 91 days of the effective date of this Agreement or of any payment made pursuant to this Agreement), the United States (on behalf of itself, its officers, agents, agencies, and departments) agrees to release AMH together with its officers, trustees, and employees from any civil or administrative monetary claim the United States has or may have under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812; the Civil Monetary Penalties Law, 42 U.S.C. 1320a-7a; or the common law theories of payment by mistake, unjust enrichment, breach of contract, fraud, or disgorgement for the Covered Conduct.

4. Subject to the exceptions in Paragraph 5 below, in consideration of the obligations of AMH set forth in this Agreement, conditioned upon AMH's full payment of the Settlement Amount, and subject to Paragraph 14 below (concerning bankruptcy proceedings commenced within 91 days of the effective date of this Agreement or of any payment made pursuant to this Agreement), the OIG-HHS agrees to release and refrain from instituting, directing or maintaining any administrative action seeking exclusion from the Medicare, Medicaid, or other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) against AMH under 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law), or 42 U.S.C. § 1320a-7(b)(7) (permissive exclusion for fraud, kickbacks, and other prohibited activities), for the Covered Conduct. The OIG-HHS expressly reserves all rights to comply with any statutory obligation to exclude AMH from the Medicare, Medicaid, or other Federal health care program under 42 U.S.C. § 1320a-7(a)(mandatory exclusion) based upon the Covered Conduct. Nothing in this Paragraph precludes the OIG-HHS from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 5, below.

5. Notwithstanding any term of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement as to any entity or person (including AMH) are the following:

a. Any civil, criminal or administrative liability arising under Title 26, U.S. Code (Internal Revenue Code);

- b. Any criminal liability;
- c. Except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusion from Federal health care program;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability based upon such obligations as are created by this Agreement;
- f. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- g. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct; and
- h. Any liability for failure to deliver goods or services due.

6. AMH has entered into a CIA with OIG-HHS, attached as Exhibit A, which is incorporated into this Agreement by reference. AMH will upon execution of this Agreement implement its obligations under the CIA. AMH agrees to comply with all obligations set forth in the CIA in addition to the Non-monetary Settlement Obligations set forth in paragraph 2 above. The United States agrees that, to the extent that requirements of the Non-monetary Settlement Obligations referenced in paragraph 2 above are similar to those required by the CIA, AMH may, with the prior written approval of DOJ, substitute a requirement of the CIA for its Non-monetary Settlement Obligations. DOJ agrees to consider such substitutions in good faith.

7. AMH waives and will not assert any defenses AMH may have to any criminal prosecution or administrative action relating to the Covered Conduct, which defenses may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Settlement Agreement bars a remedy sought in such criminal prosecution or administrative action. AMH agrees that this Settlement Agreement is not punitive in purpose or effect. Nothing in this Paragraph or any other provision of this Agreement constitutes an agreement by the United States concerning the characterization of the Settlement

Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

8. AMH fully and finally releases the United States, its agencies, employees, servants, and agents from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) which AMH has asserted, could have asserted, or may assert in the future against the United States, its agencies, employees, servants, and agents, related to the Covered Conduct and/or the United States' investigation and/or prosecution thereof.

9. The Settlement Amount will not be decreased as a result of the denial of claims for payment now being withheld from payment by any Medicare carrier or intermediary or any State payer, related to the Covered Conduct; and AMH agrees not to resubmit to any Medicare carrier or intermediary or any State payer any previously denied claims related to the Covered Conduct, and agrees not to appeal any such denials of claims.

10. AMH agrees to the following:

(a) Unallowable Costs Defined: that all costs (as defined in the Federal Acquisition Regulations (FAR) § 31.205-47 and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395ggg and 1396-1396v, and the regulations and official program directives promulgated thereunder) incurred by or on behalf of AMH, its present or former officers, directors, employees, shareholders, and agents in connection with the following shall be "unallowable costs" on government contracts and under the Medicare Program, Medicaid Program, TRICARE Program, and Federal Employees Health Benefits Program (FEHBP):

- (1) the matters covered by this Agreement,
- (2) the United States' audit(s) and civil investigation(s) of the matters covered by this Agreement,
- (3) AMH's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil investigation(s) in connection with the matters covered by this Agreement (including attorney's fees),
- (4) the negotiation and performance of this Agreement,

(5) the payment AMH makes to the United States pursuant to this Agreement;

(6) the negotiation of, and obligations undertaken by AMH pursuant to its Non-monetary Settlement Obligations referenced in paragraph 2, and

(7) the negotiation of, and obligations undertaken by AMH pursuant to the CIA to: (i) Retain an independent review organization to perform annual reviews as described in Section III of the CIA; and (ii) prepare and submit reports to the OIG-HHS, are unallowable costs. However, nothing in this Paragraph 10.a.(7) that may apply to the obligations undertaken pursuant to the CIA affects the status of costs that are not allowable based on any other authority applicable to AMH. (All costs described or set forth in this Paragraph 10.a. are hereafter, "unallowable costs").

(b) Future Treatment of Unallowable Costs: These unallowable costs shall be separately determined and accounted for in non-reimbursable cost centers by AMH, and AMH will not charge such unallowable costs directly or indirectly to any contracts with the United States or any State Medicaid Program, or seek payment for such unallowable costs through any cost report, cost statement, information statement, or payment request submitted by AMH or any of its subsidiaries to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

(c) Treatment of Unallowable Costs Previously Submitted for Payment: AMH further agrees that within 90 days of the effective date of this Agreement it shall identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid, VA and FEHBP fiscal agents, any unallowable costs (as defined in this Paragraph) included in payments previously sought from the United States, or any State Medicaid Program, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by AMH or any of its subsidiaries or affiliates, and shall request, and agree, that such cost reports, cost statements, information reports, or payment requests, even if already settled, be adjusted to

account for the effect of the inclusion of the unallowable costs. AMH agrees that the United States, at a minimum, shall be entitled to recoup from AMH any overpayment plus applicable interest and penalties as a result of the inclusion of such unallowable costs on previously-submitted cost reports, information reports, cost statements, or requests for payment.

Any payments due after the adjustments have been made shall be paid to the United States pursuant to the direction of the Department of Justice, and/or the affected agencies. The United States reserves its rights to disagree with any calculations submitted by AMH or any of its subsidiaries on the effect of inclusion of unallowable costs (as defined in this Paragraph) on AMH's or any of its subsidiaries' cost reports, cost statements, or information reports.

(d) Nothing in this Agreement shall constitute a waiver of the rights of the United States to examine or reexamine the unallowable costs described in this Paragraph.

11. Subject to paragraphs 3 and 12, this Agreement is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity.

12. AMH agrees that it waives and will not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims defined as Covered Conduct.

13. AMH warrants that it has reviewed its financial situation and that it currently is solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and will remain solvent following its payment to the United States of the Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Agreement, they (a) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to AMH, within the meaning of 11 U.S.C. § 547(c)(1); and (b) conclude that these mutual promises, covenants, and obligations do, in fact,

constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants, and obligations set forth herein are intended and do, in fact, represent a reasonably equivalent exchange of value which is not intended to hinder, delay, or defraud any entity to which AMH was or became indebted, on or after the date of this transfer, all within the meaning of 11 U.S.C. § 548(a)(1).

14. If, within 91 days of the effective date of this Agreement or of any payment made thereunder, AMH commences, or a third party commences, any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors, (a) seeking to have any order for relief of AMH's debts, or seeking to adjudicate AMH as bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for AMH or for all or any substantial part of AMH's assets, AMH agrees as follows:

a. AMH's obligations under this Agreement may not be avoided pursuant to 11 U.S.C. §§ 547 or 548, and AMH will not argue or otherwise take the position in any such case, proceeding, or action that: (i) AMH's obligations under this Agreement may be avoided under 11 U.S.C. §§ 547 or 548; (ii) AMH was insolvent at the time this Agreement was entered into, or became insolvent as a result of the payment made to the United States hereunder; or (iii) the mutual promises, covenants, and obligations set forth in this Agreement do not constitute a contemporaneous exchange for new value given to AMH.

b. If AMH's obligations under this Agreement are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the United States, at its sole option, may rescind the releases in this Agreement, and bring any civil and/or administrative claim, action, or proceeding against AMH for the claims that would otherwise be covered by the releases provided in Paragraphs 3-4, above. AMH agrees that (i) any such claims, actions, or proceedings brought by the United States (including any proceedings to exclude AMH from participation in Medicare, Medicaid, or other Federal health care programs) are not subject to an "automatic stay" pursuant to 11 U.S.C. Section 362(a) as a result of the action, case, or proceeding described in the first clause of this

Paragraph, and that AMH will not argue or otherwise contend that the United States' claims, actions, or proceedings are subject to an automatic stay; (ii) AMH will not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions, or proceeding which are brought by the United States within 90 calendar days of written notification to AMH that the releases herein have been rescinded pursuant to this Paragraph, except to the extent such defenses were available on the date the United States filed its complaint in this case; and (iii) the United States has a valid claim against AMH in the amount of \$ 4.2 Million, and the United States may pursue its claim in the case, action, or proceeding referenced in the first clause of this Paragraph, as well as in any other case, action, or proceeding.

c. AMH acknowledges that its agreements in this Paragraph are provided in exchange for valuable consideration provided in this Agreement.

15. Upon receipt of the payment described in Paragraph 1 above, the United States shall promptly sign and file a Joint Stipulation of Dismissal with prejudice of the Civil Action pursuant to the terms of the Agreement.

16. AMH agrees that the United States may obtain specific performance of any provision of this settlement agreement.

17. Each Party to this Agreement will bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

18. AMH represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

19. This Agreement is governed by the laws of the United States. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Agreement will be the United States District Court for the Eastern District of Pennsylvania, except that disputes arising under the CIA shall be resolved exclusively under the dispute resolution provisions in the CIA.

20. This Agreement and the CIA constitute the complete agreement between

the Parties. This Agreement may not be amended except by written consent of the Parties except that only AMH and OIG-HHS must agree in writing to modification of the Corporate Integrity Agreement.

21. The individuals signing this Agreement on behalf of AMH represent and warrant that they are authorized by AMH to execute this Agreement. The United States signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement.

22. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same agreement.

23. This Agreement is binding on AMH's successors, transferees, and assigns.

24. All parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

25. This Agreement is effective on the date of signature of the last signatory to the Agreement. Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Settlement Agreement.

THE UNITED STATES OF AMERICA

PATRICK L. MEEHAN
United States Attorney

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Dated: _____

OFFICE OF INSPECTOR GENERAL
DEPARTMENT OF HEALTH AND HUMAN SERVICES

LEWIS MORRIS
Chief Counsel to the Inspector General
U. S. Department of Health and Human Services

DATE

AMH - DEFENDANT

DATED: _____

BY: _____
RICHARD L. JONES, JR.,
President, Abington Memorial Hospital

DATED: _____

BY: _____
James M. Becker, Esquire
Saul Ewing LLP
Counsel for Abington Memorial Hospital